IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 6, 2006 Session

NORMAN CHRISTIAN LINN, ET AL. v. WALTER M. HOWARD, ET AL.

Appeal from the Chancery Court for Roane County
No. 13,939 Frank V. Williams, III, Chancellor

No. E2006-00024-COA-R3-CV - FILED JANUARY 26, 2007

This lawsuit was originally filed by a number of plaintiffs seeking to quiet title and establish their right to unlimited use of a runway easement at the Meadowlake Airpark. The trial court entered a judgment granting the plaintiffs most of the relief they requested. Well after the judgment became final, several of the plaintiffs filed a petition seeking to have defendant Walter Howard held in contempt of court because of his willful obstruction of the runway. The trial court found Mr. Howard in civil contempt. The defendants appeal challenging various rulings of the trial court contained in the final judgment, as well as the later finding of civil contempt. The defendants also challenge the jurisdiction of this Court over the appeal as it pertains to the finding of civil contempt. The plaintiffs claim this appeal is frivolous. We conclude that the appeal is frivolous because none of the issues raised by the defendants had a reasonable chance of success. We affirm the judgment of the trial court and remand for a determination as to the expenses due the plaintiffs pursuant to the provisions of T.C.A. § 27-1-122 (2000).

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Walter M. Howard and Donna Howard, appellants, *pro se*.

John McFarland, Kingston, Tennessee, for the appellees, Jan Randle, Lola Kirkpatrick, Kathy Caruthers, Hoa Burlingame, Sally Merian, and Arkay Aero, LLC.

OPINION

I.

This protracted litigation began in March of 2001 when 25 named plaintiffs filed suit seeking to quiet title and establish their right to unlimited and unencumbered use of a runway easement at the Meadowlake Airpark in Roane County. The plaintiffs filed suit against eleven defendants.[1] Following a trial, on June 18, 2003, the trial court entered a judgment which stated, *inter alia*, that:

> all property owners in said subdivision are entitled to unlimited and unencumbered use of the runway easement as defined and described in the 1968 plat….

The defendants filed a timely motion for new trial and/or motion to alter or amend the judgment. On February 23, 2004, the trial court entered a "Final Order Regarding Post-Trial Motions" (the "final order"). In the final order, the trial court denied the vast majority of the post-trial requests made by the defendants. The trial court also stated that the defendants:

> are prohibited from intentionally causing damage to the runway, taxi-ways, or any other easement that would interfere with the access rights previously awarded to the Plaintiffs in this cause. Any party that deems an injunction or restraining order is necessary may file the appropriate pleading with the Court seeking such redress.

No appeal was taken from the judgment or order on the post-trial motion, and, with the passage of time, the latter order became final.

Approximately 15 months after the entry of the final order, the plaintiffs filed a petition for contempt and restraining order. According to the petition, the defendant Walter Howard placed orange cones in the middle of the runway and nailed down yellow boards making an "X" across the runway.[2] The plaintiffs claimed these actions were contemptuous and in direct violation of the trial court's previous judgment. The plaintiffs further claimed that because of these actions, no one was able to use the runway. The plaintiffs obtained a temporary restraining order which ordered the defendants to remove the obstructions; it also prohibited them from placing any further obstructions on the runway. Following a hearing on the petition for contempt, the trial court entered an order on December 6, 2005, stating, in relevant part, as follows:

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[1] It appears that only six of the originally named plaintiffs are currently still involved in this lawsuit. The only remaining defendants are Walter Howard and Donna Howard dba Meadowlake Airpark. Any future reference in this opinion to "the plaintiffs" or "the defendants" only refers to the remaining parties. We also note that the defendants have consistently complained about the caption of this case containing the name of Norman Christian Linn when Mr. Linn is no longer an active plaintiff in this case. The caption of this case was determined by the first pleading, *i.e.* the complaint filed by Mr. Linn and the other plaintiffs. The caption of this case does not change because Mr. Linn is no longer involved in the case.

[2] Apparently, the "X" means the runway is closed.

> [Based] upon the [Petition] for Contempt, Answer to various motions by plaintiffs, the Notices to Court of the defendants and upon the entire record including *the testimony of the parties, the witnesses* and exhibits filed from all of this the Court [finds:]
>
> The defendant, Walter M. Howard, is in willful contempt of prior court orders for closing the airport and restricting the plaintiffs' use of the runway easement as defined by prior order of this court and as punishment for said contempt the defendant, Walter M. Howard, is remanded to the custody of the Roane County Sheriff's Department to be confined for forty-eight (48) hours as punishment for his civil contempt for deliberately violating this court's order.
>
> *Sua sponte* the parties are permanently enjoined from using the previously defined easement of the runway strip for any other purpose other [than] aviation purposes and activities that are associated with aviation.
>
> * * *
>
> That the 1972 restrictive covenants apply to the entire development and consequently defendant's [sic] mobile home and camper are in violation of the 1972 restrictive covenants. Therefore, the Howards shall have 120 days from the entry of the Order in this matter to remove from Meadowlake Subdivision the offending structures ….
>
> That the plaintiffs are awarded a judgment against the defendants, Walter M. Howard and Donna Howard, in the amount of $1,957.50 which represents one-half (½) of the plaintiff's [sic] attorney fees which total $3,915.00 for collection of which may issue if necessary.

(Original paragraph numbering omitted; emphasis added).

II.

The defendants appeal and raise numerous issues. The various issues can be grouped into three categories. The first group of issues challenge various rulings by the trial court in the original judgment and final order. The second group of issues surround the finding that defendant Walter Howard is in civil contempt. The defendants' third issue is a claim that the appeal from the finding of civil contempt should lie with the Supreme Court, not this Court. The plaintiffs raise one issue, which is a claim that this appeal is frivolous and, therefore, they should be awarded their attorney's fees incurred on appeal.

III.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations – one that we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no such presumption of correctness attaching to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

IV.

As stated previously, the defendants' first group of issues surround rulings made by the trial court leading up to, and in, its judgment and final order. However, the order of February 23, 2004, became final 30 days after its entry when the defendants failed to file a notice of appeal challenging the propriety and correctness of the trial court's rulings. The defendants took no appellate action in this case until the plaintiffs' petition for contempt was sustained by the trial court. It is from this finding of contempt that the defendants now appeal.

In ***Swift v. Campbell***, 159 S.W.3d 565 (Tenn. Ct. App. 2004), this Court observed that:

> The concept of "final completion" as it applies to civil cases is straightforward. A judgment in a civil case becomes final if a notice of appeal is not filed within thirty days after the entry of a final judgment or an order denying a timely filed Tenn. R. Civ. P. 59 motion.

Swift, 159 S.W.3d at 573.

In ***Frazier v. Campbell***, No. W2006-00031-COA-R3-CV, 2006 WL 2506706 (Tenn. Ct. App. W.S., filed August 31, 2006), *no appl. perm. appeal filed*, we were confronted with an untimely challenge to a final judgment made by a *pro se* litigant. We concluded that because the notice of appeal was untimely filed, the trial court's order was final and this Court was "without jurisdiction to hear the appeal." 2006 WL 2506706, at *2. We further stated:

> While we realize the "legal naivete" of a *pro se* litigant such as Frazier, we must not allow him an unfair advantage because he represents himself. ***Irvin v. City of Clarksville***, 767 S.W.2d 649, 651-52 (Tenn. Ct. App. 1989). *Pro se* litigants who invoke the complex and technical procedures of the courts assume a very heavy burden. ***Id***. at 652, (citing *Gray v. Stillman White Co.*, 522 A.2d 737, 741 (R.I. 1987)). While they are entitled to fair and equal treatment, they must follow the same procedures as a represented party. ***Id***. (citations omitted).

> We find it appropriate to include the following observation of the Eastern Section of this Court, when faced with this same situation in ***Grigsby v. Univ. of Tenn. Med. Ctr.***, No. E2005-01099-COA-R3-CV, 2006 WL 408053, at *2-3 (Tenn. Ct. App. Feb. 22, 2006). The Court was forced to dismiss the appeal of a *pro se* litigant because his notice of appeal was not timely filed, and stated:
>
> > We do not favor dismissing *pro se* litigants' appeals on what might appear to be technicalities. However, while parties who choose to represent themselves are entitled to fair and equal treatment, they are not entitled to shift the burden of litigating their case to the courts, *see Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983), or to be excused from complying with the same substantive and procedural requirements that other represented parties must adhere to. *See Irvin v. City of Clarksville*, 767 S.W.2d 649, 652 (Tenn. Ct. App. 1988). Accordingly, they must act within the time periods provided by the applicable statutes and rules in order to have their cases considered. *See Williams-Guice v. Board of Educ.*, 45 F.3d 161, 164 (7th Cir. 1995); *Kelley v. Secretary, United States Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987).
>
> ***Id.***, (citing *Goad v. Pasipanodya*, No. 01A01-9509-CV-00426, 1997 WL 749462, at *2 (Tenn. Ct. App. Dec. 5, 1997)). Unfortunately Mr. Frazier's appeal was not timely filed, and therefore we may not consider the issues he has presented for our review.

Frazier, 2006 WL 2506706, at *3.

In the present case, because the defendants did not file a timely appeal from the trial court's judgment and final order, we are without jurisdiction to consider any of the defendants' issues on this appeal which challenge the propriety of those rulings. The February 23, 2004, final order is the law of this case. The defendants chose not to appeal that final order. Hence, we cannot go behind that final order. Therefore, we cannot consider any of the defendants' issues which challenge the propriety or correctness of that order.

The defendants' next group of issues surround (1) the trial court's finding that defendant Walter Howard was in civil contempt and (2) the trial court's authority to so hold. In ***Johnson v. Wilson***, No. E2005-00523-COA-R3-CV, 2005 WL 2860182 (Tenn. Ct. App. E.S., filed October 31,

2005), *no appl. perm. appeal filed*, this Court observed as follows with regard to findings of civil contempt:

> Tennessee courts have the inherent authority and discretion to punish for acts of contempt. ***Reed v. Hamilton***, 39 S.W.3d 115, 117 (Tenn. Ct. App. 2000). However, a court's authority to hold a party in contempt is limited to the conduct described in Tenn. Code Ann. § 29-9-102 (2000). *See* ***Black v. Blount***, 938 S.W.2d 394, 397-98 (Tenn. 1996); ***State v. Turner***, 914 S.W.2d 951, 955 (Tenn. Crim. App. 1995). Among the conduct which courts have the authority to punish as contempt is "[t]he willful disobedience or resistance of any officer of the said courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts." Tenn. Code Ann. § 29-9-102(3).
>
> The language of Tenn. Code Ann. § 29-9-102(3) is unambiguous. Two elements are required for a finding of contempt: (1) willful disobedience or resistance, and (2) a lawful writ, process, order, rule, decree, or command of a court of this State. Tenn. Code Ann. § 29-9-102(3); ***State v. Winningham***, 958 S.W.2d 740, 745 (Tenn. 1997). A court order specifically mandating or prohibiting the alleged contemptuous conduct is essential. *See* ***Overnite Transp. Co. v. Teamsters Local Union No. 480***, [172 S.W.3d 507, 511-12 (Tenn. 2005)] ("One may violate a court's order by either refusing to perform an act *mandated by the order* or performing an act *forbidden by the order*.") (emphasis added).

Johnson, 2005 WL 2860182, at *3.

The defendants' various challenges to the finding of civil contempt fail for two reasons. First, the defendants again challenge the validity of the underlying judgment and final order which prohibited them from engaging in certain conduct, such as obstructing the runway. To the extent the defendants' civil contempt issues on appeal challenge the validity of the underlying orders, they fail for the reason discussed at length above regarding the first group of issues raised by the defendants, *i.e.*, there was no timely appeal filed from the trial court's final order. Second, the defendants also challenge the factual finding by the trial court that defendant Walter Howard was in civil contempt. According to the trial court's order following the hearing on the petition for contempt, the trial court heard testimony from parties and other witnesses. However, no transcript from that hearing has been filed in the record on appeal. In the absence of such a transcript, we must presume the trial court's factual findings are correct. *See* ***Taylor v. Allstate***, 158 S.W.3d 929, 931 (Tenn. Ct. App. 2004); ***Sherrod v. Wix***, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). We cannot evaluate the sufficiency of evidence that is not before us. By the same token, we cannot accept as true the defendants' recitation of the evidence in their brief. Under Rule 24 of the Rules of Appellate Procedure, that

evidence must be presented by way of a verbatim transcript or a statement of the evidence that has been submitted to the trial court for its approval. We have neither.

The defendants' third and final issue does not come from their brief, but was raised by way of a separate document filed with this Court. Specifically, the defendants rely on ***Collier v. City of Memphis***, 160 Tenn. 500, 26 S.W.2d 152 (1930) for the proposition that jurisdiction of an appeal in a contempt proceeding is with the Supreme Court, not this Court. As explained by our Supreme Court in ***Overnite Transp. Co. v. Teamsters Local Union No. 480***, 172 S.W.3d 507 (Tenn. 2005):

> *Collier* predate[s] the Tennessee Rules of Appellate Procedure, which became effective on July 1, 1979. A principal purpose of the Rules of Appellate Procedure is to bring together in one place a simplified, coherent, and modern body of law. Advisory Commission Comments to Tenn. R. App. P. 1. These rules are intended to replace the appellate procedure that was governed by scattered provisions of the Tennessee Code and the rules and decisions of the appellate courts. *Id.*…

Overnite, 172 S.W.3d at 509-10 (footnote omitted). The ***Overnite*** Court went on to note that the Court of Appeals has jurisdiction of appeals involving civil or criminal contempt arising out of a civil matter. ***Id***. at 510 n.2. (citing T.C.A. § 16-4-108(b) (1994)). The relevant statutory provision currently provides that:

> The court of appeals also has appellate jurisdiction over civil or criminal contempt arising out of a civil matter.

T.C.A. § 16-4-108(b) (1994). In short, the ***Collier*** case is no longer the law. The defendants' third issue has no merit.

We now address the plaintiffs' issue that this appeal is frivolous and that they are entitled to damages in accordance with T.C.A. § 27-1-122 (2000). To summarize: (1) the defendants have challenged rulings by the trial court which were final and for which no appeal was taken in a timely fashion; (2) the defendants have challenged factual findings by the trial court which involved testimony by the parties and witnesses, but they have failed to provide us with a transcript of the testimony or statement of the evidence; and (3) the defendants challenged the jurisdiction of this Court relying on a case from 1930 which is no longer the law.

An appeal is deemed frivolous if it is devoid of merit or if it has no reasonable chance of success. ***Bursack v. Wilson***, 982 S.W.2d 341, 345 (Tenn. Ct. App. 1998); ***Industrial Dev. Bd. v. Hancock***, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995). The only issues on this appeal that were timely raised are those surrounding the finding of civil contempt. However, without a transcript or statement of the evidence, this appeal had no chance of success. This appeal is frivolous and this

matter is remanded to the trial court for a determination as to the expenses due pursuant to the provisions of T.C.A. § 27-1-122 (2000).

V.

The judgment of the trial court is affirmed, and this cause is remanded to the trial court for (1) enforcement of the trial court's judgment; (2) a determination as to the expenses due pursuant to the provisions of T.C.A. § 27-1-122 (2000); and (3) collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellants, Walter Howard and Donna Howard.

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CHARLES D. SUSANO, JR., JUDGE